



NATIONAL AUTOMOBILE DEALERS ASSOCIATION
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Legal & Regulatory Group

January 18, 2006

Via E-Mail

Federal Communications Commission
Consumer & Governmental Affairs Bureau
445 12th Street, S.W.
Washington, D.C. 20580

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act
of 1991 CG Docket No. 05-338

Dear Sir/Madam:

The National Automobile Dealers Association (“NADA”) submits the following comments in response to the Federal Communications Commission’s (“FCC” or the “Commission”) notice and request for comment on proposed rules relating to unsolicited facsimile advertisements, as required under the Junk Fax Prevention Act of 2005 (“JFPA”). 70 Fed. Reg. 75,102 – 75,110 (December 19, 2005).

NADA represents approximately 20,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. Our members employ more than 1.3 million people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration (“SBA”).

Established Business Relationship Exemption (EBR)

The Commission seeks comment on whether it is appropriate to limit the EBR duration for unsolicited facsimile advertisements. Although the JFPA explicitly gives the FCC authority to establish a time limit on the EBR, the law also directs the Commission to complete four tasks before making such a determination. NADA respectfully submits that at this time, addressing the issue of limiting the duration of an EBR, is inappropriate and premature. Despite the untimely nature of this discussion, NADA extends strong support for an unlimited EBR duration, particularly in light of the new opt-out requirement imposed by the JFPA. This provides a convenient mechanism for recipients to cease receiving unwanted faxes.

If recipients do not exercise their opt-out right under the simple procedure envisioned by the statute, there is no reason to assume that either the sender or the recipient wishes to terminate their business relationship. The FCC rules implementing the Telephone Consumer Protection Act (“TCPA”) had recognized an EBR exemption for facsimile communication for several years and the JFPA has preserved this important exemption. The FCC’s comparison to the telemarketing EBR time restrictions is inapposite since most faxes are sent between businesses, while telemarketing rules are limited to residences. Hence, consumer expectations are a much less significant factor in the context of fax advertisements. Frankly, there is no justifiable purpose to impose EBR limitations now. If future complaint data indicates a need for subsequent limits, the Commission can revisit the issue.

The Commission also asks for comments describing the costs to senders of demonstrating the existence of an EBR that is limited in duration, if the Commission adopts any such limits. The time and resources associated with training, record-keeping and other compliance costs for tracking a limited duration EBR would be unjustly burdensome. Small businesses in particular, lack the appropriate in-house expertise and resources to develop effective compliance solutions. Many of our members are businesses engaged in some type of marketing, whether it is done via fax, telephone, e-mail or direct mail. These businesses have already assumed significant compliance costs associated with federal and state telemarketing and e-mail restrictions. Imposing additional compliance requirements to track EBR’s pertaining to faxes, would place a new burden on small entities that already are struggling to comply with the ever-expanding list of federal regulations affecting their businesses. In addition, as it relates to our medium and heavy-duty truck dealers, (who typically have no business connection to consumers and thus have not had to develop procedures for complying with the National DNC rules) creating a time limit on the EBR would create an entirely new burden.

Notice of Opt-Out Opportunity

The Commission asks commenters to describe those circumstances under which a notice should be considered “clear and conspicuous.” This standard has been used by federal regulators for a number of years, particularly among disclosure rules established to protect consumers. Although entities subject to consumer protection laws are familiar with the “clear and conspicuous” standard, we ask the Commission, as permitted, to provide illustrative guidance, safe harbor language and non-exclusive examples of how users may comply with this requirement.

The Commission also seeks comment on the “shortest reasonable time” within which a sender of unsolicited facsimile advertisements must comply with a do-not-fax request. NADA agrees that a 30-day limitation is a reasonable period of time. Mandating a processing period less than 30-days may be overly burdensome for small businesses that are already inundated with compliance requirements imposed by other federal marketing laws. Also, since the Commission has imposed a 30-day

time limit for complying with telemarketing opt-outs, a consistent time period for faxes would help ease additional compliance burdens.

The Commission requests comment on whether the Commission should enumerate specific cost-free mechanisms for making a do-not-fax request. The JFPA explicitly requires facsimile opt-out notices to include a contact telephone and facsimile machine number for the recipient to transmit an opt-out request. In addition to toll-free telephone numbers, we ask the FCC to recognize e-mail as an acceptable cost-free mechanism. It is safe to assume that most businesses in this day and age have some type of access to the Internet and an e-mail address. Additionally, in connection with other opt-out methods, we ask the Commission to acknowledge that businesses should only be required to honor opt-out requests that are submitted pursuant to valid opt-out instructions provided by the sender. Otherwise, liability exposure will increase due to the difficulty of tracking other forms of notice, such as direct mail or in-person verbal requests. Although businesses should make every reasonable effort to honor such opt-outs methods, they should not be found in violation of the law if the request is somehow not communicated to the proper department or individual that is responsible for responding to fax opt-out requests.

The Commission also seeks comment on whether to exempt certain classes of small business senders from the requirement to provide a cost-free mechanism for a recipient to transmit a request not to receive future facsimile advertisements. The answer is affirmative. As stated earlier, a substantial number of our members are small businesses, as defined by the SBA. In fact, based on 2004 data, the average new car dealership employs 52 people, with 55% employing 50 people or less. Although SBA's Small Business Size Standards are currently undergoing changes due to pending rule-makings, consistent with our request to the SBA, we ask the Commission to adopt a 100-employee standard, in the context of new car dealerships. The 100-employee standard is consistent with the SBA size standard for truck dealers, which has not changed since 1986. Imposing small business size standards based on the number of employees, rather than gross receipts, simplifies the number of size standard levels and eliminates the need to update and adjust size standards for inflation.

Request to Opt-Out of Future Unsolicited Advertisements

The FCC asks for comment on situations in which a consumer that has made a do-not-fax request of a sender subsequently provides express invitation or permission to receive facsimile advertisements from that entity. For example, an NADA member who has opted out of receiving fax advertisements from us, may contact our Management Education department to request information on new dealership management education guides that he/she is interested in purchasing. The department may fax the member a list of new guides and prices, per the express invitation from the member. In this scenario, the facsimile should not be found in violation of the member's prior opt-out request, since express permission was

granted.

Authority to Establish Nonprofit Exception

The Commission seeks comment on whether the Commission should allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the associations' tax-exempt purpose that do not contain the "opt-out" notice required by the JFPA. The answer is affirmative. As a national trade association with members throughout the United States, NADA frequently relies on fax technology as a method of communicating a variety of membership benefits such as newsletters, special offers, updates on our national convention, etc. Since our members have paid dues and have voluntarily provided their fax numbers to us, they expect to receive membership benefits via fax, some of which may fall under the broad definition of fax advertisements. For example, one of our weekly newsletters is transmitted to members via e-mail and fax. The newsletter contains articles, regulatory news and other information that is pertinent to the automotive industry. In some instances, the newsletter may contain information about an upcoming convention or include a segment informing members of the availability of a new dealer guide publication. That particular week, the newsletter may contain language that is considered a fax advertisement, even though the fax is transmitting information that falls within the scope of membership benefits. An exception for tax-exempt professional or trade associations would assist our compliance efforts and eliminate inadvertent violations of federal law when communicating with our members.

The Commission also asks how members of tax-exempt associations obtain the necessary information to opt-out if the associations are not required to provide such information. Every NADA member should be able to contact us, whether it is through our Internet website, e-mail, department telephone directory or fax. Upon joining the association, all NADA members are provided with a membership packet, which contains contact information for every department within the association. Thus, if a member no longer wishes to receive fax advertisements from us, they have a number of ways to contact us. In fact, several members have done so already and have been deleted from our membership fax distribution list. As an active trade association, we encourage our members to contact us with any questions or concerns.

NADA appreciates the opportunity to comment on this matter.

Sincerely,

NADA Comments to FCC
January 18, 2006

Smitha Koppuzha
Staff Attorney